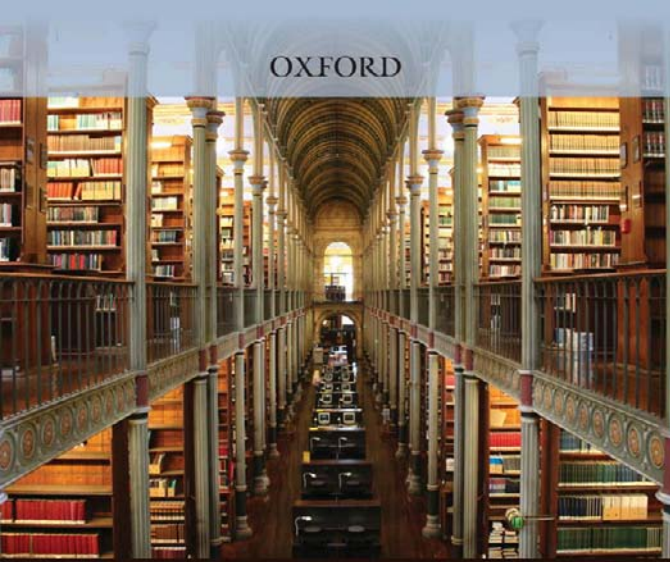


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Douglas Broder

U.S. Antitrust Law and Enforcement

A Practice Introduction

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Douglas Broder

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Contents

ACKNOWLEDGMENTS	xiii
ABOUT THE AUTHOR	xv
FOREWORD	xvii
CHAPTER 1: Overview and History of U.S. Antitrust Enforcement	1
§1.01 Overview	2
§1.02 A Brief History of U.S. Antitrust Enforcement	5
[A] Introduction	5
[B] The Early Years: 1890–1955	6
[C] Antitrust Enforcement at its Height: 1955–1980	7
[D] Antitrust Enforcement Wanes in the Reagan-Bush (1) Era	9
[E] Antitrust Enforcement Under the Clinton Administration	10
[F] Antitrust Enforcement Since 2000	11
CHAPTER 2: Federal Antitrust Statutes	13
§2.01 Introduction	15
§2.02 The Sherman Act	15
§2.03 The Clayton Act	16
[A] Section 3: Tying Arrangements	16
[B] Sections 4 and 4A: Damage Actions, Treble Damages, and Attorney’s Fees	17
[C] Section 4B: Statute of Limitations	17
[D] Section 4C: <i>Parens Patriae</i> Actions	17
[E] Section 5: <i>Prima Facie</i> Effect for Final Judgments	17
[F] Section 5: Consent Decree Procedures (The Tunney Act)	18
[G] Section 6: Labor Exemption	18
[H] Section 7: Mergers and Acquisitions	18
[I] Section 8: Interlocking Directorates	19
[J] Sections 12 and 13: Venue, Service of Process, and Witness Subpoenas	19
[K] Section 14: Imputed Liability	20
[L] Sections 15 and 16: Injunctive Relief	20

§2.04	The Hart-Scott-Rodino Act	20
§2.05	The Robinson-Patman Act	21
§2.06	The Federal Trade Commission Act	22
§2.07	The Antitrust Civil Process Act	23
§2.08	The Foreign Trade Antitrust Improvements Act of 1982	24
§2.09	The International Antitrust Enforcement Assistance Act of 1994	24
§2.10	Acts Governing Bank Mergers	25
	[A] The Bank Merger Act of 1960	25
	[B] The Bank Merger Act of 1966	25
	[C] The Bank Holding Company Act of 1956	25
§2.11	Acts Providing Antitrust Immunity	26
	[A] The Webb-Pomerene Act	26
	[B] The Export Trading Company Act of 1982	26
	[C] The McCarran-Ferguson Act (Insurance)	26
	[D] The Defense Production Act of 1950	27
	[E] The Clayton Act and Norris-LaGuardia Act (Labor)	27
	[F] The Capper-Volstead Act (Agriculture)	27
	[G] The Charitable Gift Annuity Antitrust Relief Act of 1995	27
	[H] The Curt Flood Act of 1998	28
	[I] The Newspaper Preservation Act	28
	[J] The Local Government Antitrust Act of 1984	29
§2.12	The Wilson Tariff Act	29
§2.13	Miscellaneous Federal Statutory Provisions	30
	[A] Use of Declarations in Lieu of Affidavits: 28 U.S.C. §1746	30
	[B] Use Immunity: 18 U.S.C. §§6001–6005	30
	[C] Statute of Limitations for Criminal Antitrust Violations: 18 U.S.C. §3282	31
	[D] Expediting Act: 15 U.S.C. §29	31
CHAPTER 3:	Agreements in Restraint of Trade—Sherman Act, Section 1	33
§3.01	Introduction	35
§3.02	The Agreement Element	37
	[A] Horizontal Agreements	37
	[1] Conscious Parallelism	38
	[2] Use of Circumstantial Evidence	39
	[3] Competitor Meetings and Price Exchanges	40
	[B] Vertical Agreements	41
§3.03	The Separate Parties Element	43
§3.04	The Unreasonable Restraint of Trade Element	45
	[A] Per Se Unreasonable Agreements	46
	[1] Per Se Illegal Agreements on Price	46
	[a] Minimum Price-Fixing	47
	[b] Price-Related Agreements on Miscellaneous Terms	47
	[c] Bid-Rigging	47

[2] Per Se Illegal Non-Price Agreements	48
[a] Horizontal Customer or Market Allocation	48
[b] Output or Production Restrictions	48
[c] Concerted Refusals to Deal	49
[d] Tying, Tie-ins, and Sales on Condition	50
[B] Agreements That Violate the Rule of Reason	51
[1] Horizontal Agreements That Can Violate the Rule of Reason	52
[2] Vertical Agreements That Can Violate the Rule of Reason	54
[a] Vertical Price-Fixing or Resale Price Maintenance	55
[b] Vertical Non-Price Restraints	57
[i] Territorial Restrictions	58
[ii] Dealer Terminations	58
[iii] Customer Restrictions	58
[iv] Exclusive Dealing	58
[v] Tying; Bundling; Full Line Forcing	58
[vi] Reciprocal Dealing	59
[vii] Price Protection Agreements	59
§3.05 The Interstate Commerce Element	59
§3.06 The Injury Element: Injury, Antitrust Injury, Standing, and Damages	61
[A] Injury, Antitrust Injury, and Standing	62
[1] Injury—The Indirect Purchaser, or <i>Illinois Brick</i> , Rule	62
[2] Antitrust Injury	64
[3] Standing	65
[4] Unclean Hands, or <i>In Pari Delicto</i>	66
[B] Proof and Measure of Damages	67
§3.07 The Criminal Intent Element	67
§3.08 Defenses and Immunities	68
[A] The Statute of Limitations and Tolling	69
[1] The Government Action Toll	69
[2] The Fraudulent Concealment Toll	70
[B] Issues and Defenses Relating to Jurisdiction and Venue	70
[1] Extraterritorial Application of the U.S. Antitrust Laws	71
[2] Personal Jurisdiction	73
[C] The State Action (or <i>Parker v. Brown</i>) Defense	74
[D] The <i>Noerr-Pennington</i> or Political Action Defense	76
[E] Unclean Hands or <i>In Pari Delicto</i>	77
[F] Implied Immunities	78
§3.09 Treatment of Joint Ventures Under Section 1	79
[A] Joint Ventures as Mergers	79
[B] Rule-of-Reason Analysis	80
[1] Openness	80

[2] Shared Risk	81
[3] Increased Efficiency	81
[C] Collateral Restraints	82
[D] Exclusion from the Joint Venture and the Essential Facilities Doctrine	82
[E] Federal Guidelines	83
CHAPTER 4: Monopolization and Attempted Monopolization— Sherman Act, Section 2	85
§4.01 Introduction	86
§4.02 The Elements of a Monopolization Claim	86
[A] Monopoly Power in a Relevant Market	87
[1] The Product Market	87
[2] The Geographic Market	89
[3] Monopoly Power	89
[B] Willfulness	91
[1] Predatory Pricing, Predatory Purchasing, and Price Squeezes	93
[2] The Essential Facilities Doctrine	97
§4.03 Elements of Attempted Monopolization	98
[A] Predatory or Anticompetitive Conduct	99
[B] Specific Intent to Monopolize	99
[C] Dangerous Probability of Success	100
§4.04 Elements of Conspiracy to Monopolize	100
§4.05 Remedies	101
[A] Government Actions	101
[B] Private Actions	103
§4.06 Patents and Antitrust	104
[A] The Patent Misuse Doctrine	104
[B] The <i>Walker Process</i> Doctrine	106
[C] The Sham Litigation and <i>Noerr-Pennington</i> Doctrines	107
[D] FTC Intellectual Property Guidelines	108
[1] Innovation Markets	109
[2] Anticompetitive Effects and the Antitrust “Safety Zone”	109
[3] Description of the Agencies’ Application of General Principles	109
CHAPTER 5: Mergers, Acquisitions, and Joint Ventures— Clayton Act, Section 7	111
§5.01 Introduction	112
§5.02 <i>The Merger Guidelines</i>	115
[A] The Guidelines: Horizontal Mergers	116
[1] Defining the Market	116
[2] Measuring Concentration: The Herfindahl-Hirschman Index	117

[3] Unilateral Effects	118
[4] Mitigating Factors	119
[a] Ease of Entry	120
[b] Efficiencies	120
[c] Failing and Exiting Assets	121
[d] Market Structure	122
[e] Customer Bargaining Power	122
[B] The Guidelines: Non-Horizontal Mergers	122
§5.03 <i>The Joint Venture Guidelines</i>	123
§5.04 Merger Analysis in the Case Law	124
[A] Defining the Product Market	125
[B] Defining the Geographic Market	128
§5.05 Vertical Mergers	129
§5.06 Conglomerate Mergers; Potential Competition; Entrenchment	130
[A] Perceived Potential Competition	131
[B] Actual Potential Competition	131
[C] Entrenchment	132
§5.07 Interlocking Directorates	132
CHAPTER 6: Premerger Notification—The Hart-Scott-Rodino Act	135
§6.01 Introduction	137
§6.02 The HSR Act and the Premerger Notification Rules—Overview	138
[A] The HSR Act—Overview	139
[B] The HSR Rules—Overview	139
§6.03 Determining Reportability	140
[A] Does the Transaction Involve an Acquisition?	141
[B] Do the Parties Meet the Size-of-the-Parties Test?	142
[C] Does the Transaction Meet the Size-of-the-Transaction Test?	142
[D] Exemptions	143
[1] Acquisitions of Goods or Realty in the Ordinary Course of Business	143
[2] Acquisitions of Certain Real Property Assets and of Carbon-Based Mineral Reserves	143
[3] Acquisitions of Voting Securities or Non-Corporate Interests of Entities Holding Certain Exempt Assets	143
[4] Acquisitions Solely for the Purposes of Investment	144
[5] Acquisitions of Voting Securities Not Meeting or Exceeding Greater Notification Threshold	144
[6] Intra-Person Transactions	144
[7] Corporations at Time of Formation	145
[8] Acquisitions of Foreign Assets or Foreign Voting Securities	145
[a] Acquisitions of Assets Located Outside the U.S.	145
[b] Acquisitions of Voting Securities of a Foreign Issuer	146
[E] Who Must File	146

§6.04 Preparing and Filing The Premerger Notification and Report	147
[A] Information to be Furnished in the Premerger Notification Form	147
[1] Description of the Transaction	148
[2] Corporate Information	148
[3] Sales Data	149
[4] Documents to Be Submitted	149
[a] Transaction Documents	150
[b] Government/Financial Documents	150
[c] Analytic or 4(c) Documents	150
[B] Signed Agreement a Prerequisite for Filing	152
[C] Timing and Completion of the Filing; Filing Fees	152
§6.05 Penalties for Failure to File	153
§6.06 Inadvertent Failure to File	154
§6.07 The Thirty-Day Waiting Period	154
§6.08 Early Termination	155
§6.09 Preliminary Investigation	155
§6.10 Premerger Coordination and Gun-Jumping	156
§6.11 Second Requests	159
§6.12 Government Challenges; Consent Decrees; Injunctions	160
[A] Negotiated Settlements; Consent Decrees	161
[B] Injunction Actions	164
§6.13 Some Strategic Considerations	165
CHAPTER 7: Price Discrimination—The Robinson-Patman Act	167
§7.01 Introduction	168
§7.02 The Act's Terms	168
§7.03 The Primary, Secondary, and Third Lines	170
§7.04 Promotional and Advertising Allowances	171
§7.05 FTC Guides	171
§7.06 Defenses	171
[A] The Cost Justification Defense	172
[B] The Changing Conditions Defense	173
[C] The Meeting Competition Defense	173
CHAPTER 8: Antitrust Enforcement	175
§8.01 Introduction	177
§8.02 The Department of Justice	177
[A] Criminal Enforcement	177
[1] Grand Jury Investigations	178
[a] Grand Jury Document Subpoenas	179
[b] Grand Jury Testimonial Subpoenas for Individuals and Immunity	180
[2] Indictments, Pleas, and Trials	182

[3] Sentencing	183
[4] Leniency Programs	184
[a] Corporate Leniency Program	184
[b] Individual Leniency Program	187
[B] Civil Enforcement	187
[1] Civil Investigative Demands	187
[2] Civil Complaints	188
[3] Consent Decrees	188
[C] Merger Enforcement	189
[D] Business Review Letters	190
§8.03 The Federal Trade Commission	191
[A] FTC Remedial Powers	192
[B] FTC Enforcement Procedures	192
[1] Investigatory Procedures	192
[2] Adjudicatory Procedures	193
[3] Settlement Procedures	193
[4] Judicial Review	193
[C] Merger Enforcement	194
[D] Advisory Opinions and Policy Statements	195
§8.04 State Attorneys General	195
§8.05 Private Litigants	196
[A] Service of Process and Venue	197
[B] <i>Prima Facie</i> Effect of Prior Government Judgments	197
[C] Injunctive Relief	198
[D] Summary Judgment	199
[E] Class Actions	200
[1] Initiating a Class Action	200
[2] Motions to Dismiss	200
[3] Motions for Class Certification	201
[4] Class Notice	202
[5] Settlement of Class Actions	202
[F] The Judicial Panel on Multidistrict Litigation	203
[G] Arbitrability	203
[H] Joint and Several Liability and No Right of Contribution	204
[I] Taxability and Deductibility of Payments in Response to Antitrust Suits	205
[J] Insurance Coverage	205
[K] Attorney's Fee Awards	205
[L] Pre-Judgment Interest and Punitive Damages	206
APPENDIX: The United States Federal and Judicial Systems	207
§A.01 The U.S. Constitution and the Three-Branch Federal Government	209
[A] The Legislative Branch	210

[B]	The Executive Branch	211
[C]	The Judicial Branch	211
[1]	The Judicial Power (Subject Matter Jurisdiction)	212
[2]	The Power of Judicial Review	213
[D]	The Bill of Rights	213
§A.02	The Federal Courts and the Common Law Process	214
[A]	The Federal Court System	215
[B]	Legal Decision-Making and the Common Law Process	215
[1]	The Common Law	216
[2]	The Hierarchy of Precedent	216
§A.03	How a Case Proceeds In the Federal Courts	217
[A]	District Court Proceedings	218
[1]	The Plaintiff's Complaint	218
[2]	The Defendant's Response: Answer or Motion to Dismiss	219
[3]	Discovery	220
[4]	Summary Judgment	221
[5]	Trial	221
[6]	Post-Trial Proceedings and Judgment	223
[7]	District Court Opinions	223
[B]	Proceedings in the Circuit Courts of Appeal	224
[1]	Issues on Appeal	224
[2]	Briefing the Appeal	224
[3]	Oral Argument	225
[4]	The Court's Ruling	225
[5]	The Parties' Post-Ruling Options	225
[C]	Proceedings in the U.S. Supreme Court	226
§A.04	The U.S. Legal Citation System	227
[A]	Citations to the Constitution and Federal Statutes	227
[B]	Citations to Court and Evidentiary Rules	228
[C]	Citations to Federal Agency Rules and Regulations	228
[D]	Citations to Federal Judicial Opinions	228
[1]	Supreme Court	229
[2]	Circuit Courts of Appeal	229
[3]	Federal District Courts	230
[E]	Citations to Federal Trade Commission Opinions	234
[F]	Common Explanatory Terms and Abbreviations	234
	GLOSSARY OF ANTITRUST AND RELATED TERMS	235
	TABLE OF CASES	289
	INDEX	305

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Foreword

This is the book I wish I'd been given in 1977. A new law school graduate, I had accepted a job at the Wall Street law firm Lord, Day & Lord. Upon arriving I was told I had the good fortune to be assigned to the legendary Gordon Spivack's antitrust team. The problem was I had no idea what that meant. I had not taken a course on antitrust law and had only a dim awareness that there was such a thing. The only economics I knew came from a one-semester mandatory introductory course I had taken as a modestly motivated college freshman ten years earlier. I had never worked at a law firm and had no idea what law practice at a large corporate firm involved, let alone what went into practicing antitrust law.

I soon discovered to my chagrin that there was no single source to guide me through the maze of statutes and regulations that made up the antitrust laws, nothing to show me where to find them, what they meant, or how they were enforced. And there was nothing to introduce me to the new concepts and strange new uses of words I would encounter—*per se* versus rule of reason, horizontal versus vertical, cross-elasticity of demand, supply-side substitutability, monopsony, *nolo contendere*, and on and on. Nor was there anything to introduce me to how antitrust was practiced.

Most readers will probably not be as clueless as I was. Nonetheless, I thought then, and remain convinced, that there was a need for a one-volume book, written in plain English and readable in a sitting (admittedly a fairly long one), that surveys and categorizes the United States antitrust laws and the cases interpreting them, describes how and by whom these laws are enforced, and introduces the reader to the practice of antitrust law.

This book should be useful to law students; new attorneys who, like I was, are just beginning in antitrust practice; more senior lawyers at firms or in corporate legal departments seeking a refresher or quick introduction; non-U.S. competition law attorneys; journalists; and anyone else seeking an introduction to and overview of U.S. antitrust law, enforcement, and practice.

Chapter 1, "Overview and History of U.S. Antitrust Enforcement," contains an introductory overview of the U.S. antitrust laws and a brief review of the history of U.S. antitrust enforcement. This chapter traces the evolution of antitrust doctrine and enforcement decisions. Chapter 2, "Federal Antitrust Statutes," contains summaries of each of the most important federal antitrust and related statutes. These are the primary sources and the foundation upon which antitrust case law and enforcement are built.

Chapters 3 to 7 contain a narrative discussion of the principles of U.S. antitrust law as contained in the statutes, court decisions, and enforcement guidelines. The chapters are organized according to the primary antitrust statutes. Chapter 3, “Agreements in Restraint of Trade—Sherman Act, Section 1,” covers Section 1 of the Sherman Act, which outlaws agreements in restraint of trade (or, as referred to in the European Union, anticompetitive agreements and concerted practices). Chapter 4, “Monopolization and Attempted Monopolization—Sherman Act, Section 2,” covers Section 2 of the Sherman Act, which outlaws monopolization and attempted monopolization (abuse of a dominant position). Chapter 5, “Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7,” covers the section of the Clayton Act which outlaws anticompetitive mergers, acquisitions, and joint ventures (mergers and concentrations). Chapter 6, “Premerger Notification—The Hart-Scott-Rodino Act,” covers the Hart-Scott-Rodino Act, which regulates the premerger notification and merger clearance processes (prior notification and clearance). Chapter 7, “Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7,” covers the Robinson-Patman Act, which outlaws price discrimination.

The narrative contained in these five chapters cites and discusses numerous U.S. Supreme Court decisions. It also cites lower court decisions and secondary sources. But it makes no attempt to provide an exhaustive catalogue of lower federal and state court decisions for research purposes. Nor does it delve in depth into all the fine points and legal and economic intricacies that occupy full-time U.S. antitrust lawyers. Instead, its purpose is to convey an understanding of broad principles, statutory mandates, and statements of the regulatory agencies. At the same time, it should provide a running start for those interested in doing further research.

The book’s final chapter, Chapter 8, is called “Antitrust Enforcement.” It describes and outlines the activities of the four groups that actually enforce the U.S. antitrust laws: (1) the Antitrust Division of the U.S. Department of Justice; (2) the Federal Trade Commission; (3) the attorneys-general of the fifty individual states of the union; and (4) private civil litigants.

The book also contains an “Appendix” designed to provide context for non-U.S. lawyers and others not familiar with the U.S. federal and legal systems and the judicial decision-making process. The “Appendix” describes those systems, traces the progress of a case through the U.S. federal courts, and explains the system of citation used in this book.

In addition to the traditional index and case and authority tables, the book contains a comprehensive “Glossary” that provides short definitions of common and arcane legal and economic terms and concepts. The glossary is cross-referenced to relevant sections of the main text. Used alone, the glossary provides a quick and easy introduction to, or review of, the often counterintuitive vocabulary of antitrust. Used in combination with the index and tables, the glossary will help jump-start research into unfamiliar areas.

CHAPTER

1

**Overview and History of U.S. Antitrust
Enforcement**

§1.01	Overview	2
§1.02	A Brief History of U.S. Antitrust Enforcement	5
	[A] Introduction	5
	[B] The Early Years: 1890–1955	6
	[C] Antitrust Enforcement at its Height: 1955–1980	7
	[D] Antitrust Enforcement Wanes in the Reagan-Bush (1) Era	9
	[E] Antitrust Enforcement Under the Clinton Administration	10
	[F] Antitrust Enforcement Since 2000	11

§1.01 Overview

The antitrust laws are the original—and in many ways most important—component of the United States’ federal economic regulatory scheme. The antitrust laws seek to protect free markets and vigorous competition by setting limits on the collusive and predatory conduct and monopolistic abuses that free markets often breed. As the United States Supreme Court has put it:

Antitrust laws in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.¹

The antitrust laws’ primary focus is marketplace competition. American antitrust has its roots in the English common-law tort of unfair competition. Indeed, in England and Europe, what America calls antitrust law is commonly referred to as competition law. But modern American antitrust is, at bottom, a creature of statute.

Congress passed the first antitrust law, the Sherman Antitrust Act in 1890 to attack the trusts—oligopolistic cartels that acted collusively rather than competitively—that dominated portions of American commerce during the industrial age. Over the ensuing years, the United States federal government has created a comprehensive series of statutes and regulations aimed at preserving and regulating marketplace competition. These statutes include the Clayton Act (1914), the Federal Trade Commission (FTC) Act (1914), the Robinson-Patman Act (1936), the Celler-Kefauver Amendments to the Clayton Act (1950), and the Hart-Scott-Rodino Antitrust Improvements (HSR) Act (1976). The states have followed suit by enacting their own antitrust statutes. Most are based on, and some are even stricter than, the Sherman Act and the other federal statutes.

The federal statutes include provisions that outlaw price-fixing, certain tying arrangements, bid-rigging, monopolization, anticompetitive mergers and acquisitions, price discrimination, predatory pricing, and other restraints of trade or unfair methods of competition deemed incompatible with an open and competitive marketplace. To underscore their seriousness, the antitrust laws, have, from the beginning, treated violations as criminal as well as civil offenses. Lengthy prison terms and substantial fines await both individual and corporate violators.

Theoretically, all of the U.S. antitrust laws carry criminal penalties. In practice, however, the U.S. federal antitrust enforcement authorities do not prosecute all antitrust violations as criminal offenses. Instead, they confine

1. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

criminal prosecutions to hard-core cartel activity, i.e., clear-cut, plainly anticompetitive violations such as price-fixing and bid-rigging.

To further encourage compliance—and to encourage private as well as government enforcement—the antitrust laws permit individuals or companies injured by violations to sue for three times their actual damages (treble damages). And, in a departure from the usual American rule that each party to a litigation is responsible for paying its own court costs and attorneys' fees, the antitrust laws require losing antitrust defendants to pay the plaintiff's court costs and attorneys' fees.

The antitrust laws have spawned a large regulatory and enforcement framework. Two federal agencies, the Department of Justice's (DOJ's) Antitrust Division and the Federal Trade Commission (FTC) are responsible for enforcing of the federal antitrust laws and for creating and implementing of additional rules and regulations. The attorneys general of the fifty individual states enforce their own antitrust laws and can also bring suit on behalf of their constituents under the federal antitrust laws. Private civil plaintiffs, including a group of lawyers who specialize in bringing large antitrust class actions on a contingency fee basis, complete the enforcement apparatus.

The common law—legal principles established not by statute but through court decisions and reliance upon precedent—has also played an important role in developing of antitrust law. The Sherman Act's broad ban on "contracts, combinations and conspiracies in restraint of interstate trade" would, if not narrowed by court interpretation, outlaw every contract or agreement involving commerce that crossed a state boundary within the United States. The other antitrust statutes, though sometimes more specific, also leave ample room for interpretation. Combined with the incentive to litigation provided by treble damages; attorneys fees; and the broad enforcement authority vested in the FTC, the DOJ, and state attorneys general, these statutes have led to the creation of an enormous body of case law interpreting, reinterpreting, and refining the antitrust laws.

Although the basic concepts of antitrust—hostility to monopoly and oligopoly practices and the preservation of competition—have long been clear, the courts' and the regulatory authorities' interpretation of the laws has continuously evolved. Many decisions—even Supreme Court decisions—and statutes once viewed as stating core antitrust principles are now deemed economically and legally unsound, and have either been overruled or are simply ignored.

Certain assumptions underlying the antitrust laws have been widely accepted: Free markets are the most efficient and fairest—or least inefficient and least unfair—form of economic organization; competition on price, terms, service, efficiency, and innovation is indispensable to the proper functioning of a free market; monopoly, oligopoly, and collusion are antithetical to competition; and some form and level of regulation—with both the form and extent of regulation open to debate—is necessary to ensure that the free

markets, and competition, operate fairly and efficiently. As in any competitive enterprise, there must be rules and referees to enforce the rules. There is also, as in any competitive enterprise, constant bickering about the effectiveness of the rules, their meaning, and the fairness of their enforcement.

Antitrust has long been the subject of political controversy in the United States, controversy that has more recently been exported to Europe and, increasingly, the rest of the world. From the passage of the Sherman Act in 1890 to the present, accused monopolists and other subjects of government or private antitrust actions have vilified the antitrust laws or their enforcers as anti-business or as outmoded and lacking relevance to modern business.

The attacks on antitrust have not come only from those on the receiving end of antitrust enforcement and their defenders. A theoretical debate has long raged over what the fundamental goals of the antitrust laws are, what they should be, and how best to achieve them.² Issues in the debate include whether big alone is bad; whether the antitrust laws should be enforced vigorously to prevent major accumulations of wealth or productive capacity; whether the antitrust laws should be used to prevent corporations from becoming “too big to fail;” whether monopolies are inherently evil and should be punished or broken up, or whether they are simply evidence of successful business practices; whether monopolies are inherently self-destructive because they have no need to remain competitive and so should be left to the mercy of market forces rather than be the subject of regulatory action; whether antitrust should protect small competitors or simply ensure that consumers get the lowest, most competitive prices and best services; what form antitrust enforcement should take; how many competitors are necessary to guarantee adequate competition in a market; whether there is such a thing as an inherently efficient natural monopoly that should be permitted to exist, and, if so, whether and how it should be regulated; and whether antitrust enforcement is the most efficient means of promoting competition and regulating monopolies, or whether the free market is a more efficient regulator that needs little help except for policing and punishing the most egregious violations of fair competition.

These issues arise from tensions inherent in the free enterprise system. Take monopolies. By definition a monopolist, i.e., one with market dominance, has no, or no effective, competitors. A monopolist thus lacks the spurs provided by competition to low pricing; innovation; and the improvement of productivity, service, and quality. Monopolies also tend to be highly profitable. By definition, a monopolist can price its products with a minimum of concern about competition.

But profits and market dominance are the prizes businessmen play for in free markets. Monopolies can be the product of the rigorous application of those very qualities that antitrust aims to encourage—innovation, efficiency,

2. See generally Robert Bork, *The Antitrust Paradox* (Basic Books 1978).

and low pricing. Thus, one continuing issue is how to retain the incentive of fairly earned monopoly profits, while discouraging, and, when necessary, punishing or otherwise discouraging those who seek or maintain monopolies by unfair or predatory methods or who use monopoly power in one market (however achieved) to obtain similar power in a separate market.

Similarly, there is inherent tension between the antitrust laws, with their hostility to monopoly, and the intellectual property laws, most notably the patent laws. To encourage innovation, the patent laws—and to a lesser degree the copyright and trademark protection laws—award limited monopolies to those who take the trouble and financial risk to create new goods, services, and ideas. The result has been increasingly frequent and important collisions between the antitrust and intellectual property laws.

§1.02 A Brief History of U.S. Antitrust Enforcement

[A] Introduction

One result of the contradictions inherent in antitrust and the evolving political, judicial, social, and academic views of its application and relevance has been what some commentators have likened to a pendulum swing in the amount and nature of antitrust enforcement. In this view, the pendulum has swung from the fervor of the trustbusters at the dawn of the twentieth century to neglect during the Great Depression and World War II. After the war, the pendulum swung slowly back, reaching an extreme in the 1970s with the government structural cases seeking the breakup of IBM and AT&T, only to swing back in reaction to the attacks of the Chicago School of law and economics, whose ideas originated at the University of Chicago, as reflected in the policies of the Reagan and first Bush presidential administrations (1980–1992).

The pendulum swung back toward increased enforcement during the Clinton administration (1992–2000), both as the result of deliberate government policy and in reaction to the unprecedented merger wave that occurred in the last half of the 1990s. Once again, the government was emboldened to take on not just price-fixers—which it prosecuted in record numbers—and those attempting major mergers or acquisitions, but also monopolists, as represented by the government cases against Intel and Microsoft.

George W. Bush's administration (2000–2008) saw the pendulum move back to the right. The administration professed its belief in minimal regulation and free markets, and backed up that position by settling the Microsoft case and cutting back drastically on merger challenges. The DOJ did continue to heavily prosecute international price-fixing cartels—often the result of

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